

CDCR Valdivia Monitoring Report

San Quentin State Prison

2008-4th Quarter



CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION



VALDIVIA MONITORING TOUR San Quentin State Prison



Final Report to Task Force

Submitted by the

OFFICE OF COURT COMPLIANCE

January 12, 2008

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VALDIVIA/ARMSTRONG TOUR REPORT

San Quentin State Prison

4th Quarter 2008

December 16-17, 2008

I. EXECUTIVE SUMMARY

A) Purpose of the Tour

The Office of Court Compliance (OCC) observed parole revocation proceedings at San Quentin State Prison (SQ), and met with California Department of Corrections and Rehabilitation (CDCR) and California Parolee Advocacy Program (CalPAP) staff. The OCC also toured the Vallejo Parole Unit. The purpose of the tour was to evaluate CDCR's compliance with the requirements of the *Valdivia* Permanent Injunction, the *Valdivia* Remedial Plan, and current departmental policy and procedure pertaining to parole revocation.

B) Tour Attendees

The CDCR representatives were Russa Boyd, Deputy Commissioner; Tracy Master, Parole Services Associate; and Gregory Wyke, Correctional Counselor II, all from the Office of Court Compliance.

C) Administration of the Tour

The monitoring group observed the following processes:

Revocation:

- 7 Notice of Rights/Charges,
- 8 Probable Cause Hearings, and
- 3 Revocation Hearings.

The monitoring group also reviewed the following documents/revocation packets prior to the tour:

- 100 revocation packets. (**Exhibits 1-A and 1-B**).

The Office of Court Compliance reviewed 100 revocation packets prior to the tour in order to measure compliance with the *Valdivia* time frames as well as due process and procedural requirements. The revocation packets reviewed prior to the tour were collected from CalPAP allowing OCC to conduct analysis on packets provided to defense counsel and to identify issues specific to the site prior to the tour. A summary of the timeliness for each revocation step can be found in Exhibit 1-A. Compliance statistics and trends gathered from a review of the revocation packets are discussed in each section below. Although the body of the report addresses the most pertinent and recurring compliance deficiencies, a summary of all compliance deficiencies identified from a review of the revocation packets can be found in Exhibit 1-B.

In addition, the monitoring team collected revocation packets for the cases observed during the tour itself. A discussion of the compliance trends and deficiencies identified

during the tour are discussed in the body of the report and accompanying exhibits but are not included in Exhibits 1-A or 1-B.

D) Corrective Action Plan:

This report identifies areas in need of corrective action(s) where compliance deficiencies were observed during the monitoring tour and/or through a review of the revocation documents. The Office of Court Compliance has identified corrective action(s) for any deficiency associated with the *Valdivia* procedures/process where the compliance rate was determined to be less than 90%. The Office of Court Compliance will allow each applicable division to develop the corrective action they deem most appropriate for remedying the compliance deficiencies identified in this report. However, the Office of Court Compliance will continue to provide input and suggestions to the affected divisions in order to develop efficient corrective action and any necessary policy changes, and is available to assist with any aspect of corrective action development or implementation.

II. Probable Cause Determination

- **99% compliant with requirement that a probable cause determination be completed no later than 48-hours after placement of parole hold.**

Thirty of the 100 revocation packets analyzed prior to the tour did not include the CDCR 1502-B. **(Exhibit 1-B)**. The timeliness of the PCD was therefore not evaluated in these 30 cases. A timely probable cause determination was completed in 69/70 cases (99%). **(Exhibit 1-A)**. The late case was two days late. *Id.* The RSTS “Close Case Summary – Valdivia Timeliness Rules” report for the Vallejo Parole Unit reveals that 100% of PCDs were timely for the month of October 2008. **(Exhibit #2)**

A full understanding of the underlying reasons for the missing 1502-Bs is incomplete at this time; however, the OCC is working with DAPO and San Quentin DRU staff to identify why the documents are missing in some cases and resolve the problem. During the tour, the monitors reviewed the mail and noted that some 1502-Bs were missing from the attorney copy of the revocation packet that was sent from the parole units (a copy of the 1502-B was in the BPH copy). DAPO’s policies and procedures, entitled “Implementation of *Valdivia v. Schwarzenegger* Policy and Procedures,” filed with the Court in 2004; require that field unit support staff ensures that complete copies of revocation packets are sent from the unit. The checklist provided includes the 1502-B and all notice documents.

There were also a few instances where DRU staff did not make a copy of the 1502-B contained in the BPH packet to include it in the attorney’s copy, although it was noted that the attorney copy was missing the document. BPH’s “Decentralized Revocation Units Policies and Procedures,” filed with the Court in 2004, require that DRU staff review the revocation packet to determine complete receipt and sufficiency of documentation.

Vallejo Parole Unit Interview

The monitoring team interviewed the unit supervisor and a parole agent from the Vallejo parole unit. There were no reported issues or concerns with the unit's ability to complete a timely probable cause determination.

The unit supervisor reported he has a mandatory policy of a face to face case conference with the agent following a new arrest to discuss the alleged violations and possible remedial sanction options. The parole agent also added that the unit supervisor and parole agent discuss the sufficiency of the statement of fact contained on the 1502-B during the case conference. Both the parole agent and unit supervisor confirmed that they discuss remedial sanction options and eligibility during their case reviews at this step.

Statement of Fact on the CDCR 1502-B

There were 20/70 (29%) cases reviewed prior to the tour in which the CDCR 1502-B failed to include an adequate statement of fact for each charge in order to serve the parolee notice of the charges (**Exhibit 1-B and #3**). The Vallejo US reported he reviews the information on the CDCR 1502-B to ensure a factual statement is written for each alleged violation. He further reported he will return the document to the authoring agent for revision if he determines a factual statement does not included enough information or does not support the allegation. None of the 1502-Bs from the Vallejo parole unit contained an insufficient statement of fact. The Vallejo parole unit should be congratulated for their thorough report writing and dedication to meeting compliance in the litigation. **See Section III below for a more detailed discussion and analysis on cases where a deficient statement of fact was identified.**

❖ CORRECTIVE ACTION PROPOSED:

- The OCC will continue to monitor and investigate the issue of missing CDCR 1502-Bs from the attorney packets. DAPO and BPH supervisors should remind staff responsible for compiling and processing revocation packets that the CDCR 1502-B must be included in all BPH and CalPAP revocation packets.
- Paragraph 11 of the *Valdivia* Permanent Injunction requires that the parolee be served with actual notice of the alleged parole violation, including a short factual summary of the charged conduct. The OCC recommends that DAPO review any current policies and procedures that address what information must be included in the CDCR 1502-B and make revisions to ensure the due process requirement regarding provision of a short summary of the charged conduct is met. It also recommended that DAPO disseminate a policy and procedure requiring that an adequate short statement of fact for each alleged violation of parole be included on the CDCR 1502-B, and include specific guidance on minimum standards regarding the adequacy of the factual summary.

III. Notice of Rights/Charges

- 95% compliant with requirement that the Notice of Rights/Charges occur no later than 3-business days after the parole hold
- 96% compliant with providing parolee written notice of revocation rights and procedural timeframes (via the BPT 1100)
- 71% compliant with requirement that a short factual summary of charged conduct be provided at the time of notice (via the CDCR 1502-B).

Timeliness of Notice

The OCC uses the parolee signature and date on the BPT 1100 to determine when they received notice of the charges and revocation rights. Two cases reviewed prior to the tour were missing the BPT 1100. (**Exhibit 1-B**). It is critical the BPT 1100 is included in every complete copy of the revocation packet (both BPH and attorney copies). Without the BPT 1100, which includes the parolee's signature acknowledging service, there is no way to verify the parolee was actually served notice of his/her parole revocation rights and charges. Of the 98 total cases reviewed for compliance with the timeliness requirement, 94 notices were timely (96%). (**Exhibit 1-A**). The late cases averaged 1.75 days late. *Id.* The monitors also observed seven notices during the tour, six of which were timely.

The CDCR continues to maintain that there are a number of reasons that constitute good cause for delay in completing a notice. Examples include, but are not limited to, instances where the parolee is out to court, medically unavailable, or has been transported to another location by the County, all of which are outside the control of the State. A summary of the five late notice (four reviewed prior to the tour and one observed NOR) is in the table below, along with the results of the review to determine whether there was a good cause for delay.

Parolee Name/CDC #	NOR NLT	Date NOR Occurred	Good Cause/Not Good Cause for Delay
Allen (F55101)	09/23/08	09/24/08	<u>Not good cause</u> – Parolee was transferred to SQ on 9/22 from county jail. Paperwork was fwd to DRUNA on 9/23.
Davey (F41119)	09/19/08	09/25/08	<u>Not good cause</u> – First request for notice at SQ was reported as not received by the DRUNA. 2 nd request was necessary to complete the notice.
Flores (C760505)	09/24/08	09/25/08	<u>Not good cause</u> – Case Status notes indicate a request was faxed to DRUNA on 9/24 but not received until 9/25. Parolee was initially released from local custody and then placed back into custody on a new hold. There was confusion regarding location of parolee.
Jackson (G09418)	09/22/08	09/23/08	<u>Not good cause</u> – Case was not entered in RSTS and no reason for delay was

			documented.
Johnson (D21639)	12/16/08	12/17/08	Not good cause – DRUNA notes case was not received until after work hours on 12/16. Parolee was transferred to SQ on 12/15.

Therefore, out of 105 total cases in which timeliness of the notice could be determined, 100 cases (95%) were timely or there was good cause for delay.

According to Cal Pap's October 2008 "Notice of Rights Compliance Report," 96% of notices were timely for cases processed out of the Larkspur Cal PAP office (**Exhibit-#4**). Previous Notice of Rights reports for the Larkspur office documents timeliness for September 2008 at 95%, and August 2008 at 95%.

Supervising Notice Agent Interview

The SNA reported no current staffing vacancies. She reported that parolee movement between jail facilities and San Quentin can occasionally cause a late notice. Field notice agents are not notified when a parolee is transferred to state prison and therefore travel to the county jail to complete a notice only to learn that the parolee has been picked up for transport to San Quentin. She indicated there is no process in place to advise when a parolee is scheduled to be transferred from a county jail, nor is there a bus schedule with information showing what county jail the bus is coming from or a consistent arrival time at San Quentin.

The SNA reported she monitors RSTS reports and agents daily logs, reviewing causes of late notices or missed notices. She conducts follow-up with staff and parole units when deficiencies are identified.

Plaintiffs' September 25, 2008 monitoring report for San Quentin identified deficiencies in the quality of the NORs observed during the 3rd quarter tour. The SNA reviewed the report and conducted one-on-one training with the notice agent to correct noted deficiencies. Monitors had an opportunity to observe the same notice agent during this tour and observed that most issues were addressed and corrected through the informal training.

Preparation for Notice

The notice agent followed current departmental policy and procedures in preparing his cases for notice, including a DEC review for disability and accommodation needs information.

Method of Notice

For the most part, the notice agent conducted each notice in a manner consistent with current DAPO policy and procedure. He clearly explained the purpose of his visit and completed the ADA review by having the parolee read the ADA statement contained in Section I of the BPH 1073 and confirming they understood by asking them to explain what they read in their own words. He asked questions related to education and mental health and documented the information in Section III of the 1073. He also allowed the

parolee to self-identify any accommodation needs. He reviewed all documents with the parolee, including the 1502-B and BPH 1100. Although he did not read the actual charges aloud, he did point out where the charges were listed and where the explanation of each charge was written on the document. The notice agent concluded each notice by asking if the parolee had any questions and understood the process. Plaintiffs' September 25, 2008 tour report noted a deficiency because the notice agent does not normally read the charge(s) on the 1502-B to the parolee (unless they cannot read). DAPO does not have a policy that requires the notice agent to read the charges to the parolee. Parolees are able to ask questions should they need clarification of the verbiage of a particular charge; however, notice agents cannot explain why a charge has been alleged as they are not familiar with the incident that lead to the arrest.

A summary of the compliance deficiencies identified during the tour is as follows:

- The notice agent was first observed reading only certain parts of the BPH 1100 to the parolee. The monitors advised the SNA and the notice agent that DAPO's "Implementation of *Valdivia v. Schwarzenegger* Policy and Procedures," filed with the Court in 2004, requires the notice agent to read the BPH 1100 to the parolee. Since that time DAPO has also allowed notice agents to provide the form to the parolee, and allow them time to read it and ask questions for clarification. The notice agent followed DAPO policy for the remaining notices.
- The monitors were concerned about the locations where some of the notices were conducted within the individual housing units at San Quentin. The OCC continues to maintain the *Valdivia* Injunction does not require notices be completed in a completely confidential setting; however, the notice agent should attempt to secure a location that affords a reasonable amount of quiet and privacy, when possible. A good example of this setting was observed in the Badger unit, where a private office is regularly provided for the agent to conduct notices. In contrast, notices in the Administration Segregation unit are conducted while the parolee is secured in a holding cell in front of the lower cells. The location is of concern due to very loud background noise and ongoing construction. Because there were several monitors present the notice agent used a private office. It is unclear why requests are not consistently made to utilize this office (or another available area) within Administrative Segregation. Other notices were observed in the walkways of the housing unit where background noise was a prevalent distraction.
- The notice agent did not document all self-identified information in Section III. In one instance a parolee self-identified that he wore glasses but did not have them with him. The notice agent offered the magnifier but the parolee declined to use it, stating he could see the documents. However, the notice agent did not document that the magnifier was offered/declined in Section III of the BPT 1073. In another notice observed, the parolee complained of a back issue and the agent inquired if he needed a cane, the parolee declined. Again this information was not noted on the BPT 1073. Although monitors

are not identifying this as a deficiency, documenting such information would be useful to inform staff responsible for ensuring accommodation during the remainder of the revocation process and protect notice agents from any future claims that an accommodation was not offered during a notice. (Johnson, D21639, Baulwin, P88002) (Exhibit #5).

Adequate statement of facts on the CDCR 1502-B

The *Valdivia* Permanent Injunction requires the parolee be given “**actual notice of the alleged parole violation, including a short factual summary of the charge conduct.**” Officers from outside law enforcement agencies do not provide the details of most arrests prior to completion and submission of their arrest report. Therefore, the parole agent does not know the facts to support the alleged violations until the arresting officer generates the police report. CDCR maintains that stating the information provided by the arresting law enforcement agency, including the name of the arresting agency and charge(s) the parolee was reportedly arrested for, is sufficient until the final police report is made available to the parole agent.

In those instances where DAPO initiates the arrest, or the facts underlying the arrest are known to the parole agent, a short factual summary of the charged conduct, including a summary of the parolee behavior and/or evidence leading to the violation charge(s), should be included on the CDCR 1502-B (rather than a minimal recitation of the charges themselves). For example, if a parolee is arrested by law enforcement on a Parolee at Large (PAL) warrant, the parole agent should indicate on the 1502-B the facts that support the absconding charge. The short factual summary might read that the agent attempted a home visit and left a card with reporting instructions, but the parolee did not report, and contacted family members living at the parolees ROR who indicated that they have not seen the parolee for weeks. Such language provides a factual basis for the charge. It is insufficient if the parole agent simply indicates the parolee was arrested on a PAL warrant. The parolee behavior that gives rise to issuance of the PAL warrant is the critical component of the required factual summary. A short factual summary of the charged conduct is necessary to serve the parolee notice of the alleged violations and allow him/her to know the facts that supported placement of the parole hold and begin formulating a defense. This is required by the Permanent Injunction.

20/70 (29%) 1502-Bs reviewed prior to the tour failed to meet the Injunction’s requirement to provide a short factual summary of each charged parole violation. **(Exhibits 1-B and #3).** The OCC continues to see this issue at most locations in the state. At the core of agents’ failure to include an adequate factual summary on the 1502-B to sufficiently notice the parolee may be that the applicable DAPO policy (04-30) does not give clear direction to agents on the requirement of the Injunction in this regard. DAPO did issue an informational memorandum on January 2, 2008 that provides the necessary direction to bring agents into compliance. DAPO also issued a *Valdivia* Alert on June 12, 2008, directing staff to include a short factual summary for all known charges. Additionally, in the 2004 roll-out training for *Valdivia*, and in the refresher training conducted in 2006 and 2007 for agents, specific direction was given about including a short factual summary on the 1502-B. DAPO should consider amending

policy 04-30 to include the requirement that agents include a short factual summary for each charge on the 1502-B, and provide clear direction on the minimum standards to meet this requirement.

On a positive note, none of the deficient 1502-Bs were from the Vallejo parole unit, which was visited during the tour. The Vallejo parole unit should be congratulated for their thorough report writing and dedication to meeting compliance in the litigation.

Staff from DAPO Headquarters recently completed statewide training for field staff, which included a discussion regarding minimum standards for the factual summaries contained on the 1502-B, as well as the Injunction's requirements as they pertain to noticing the parolee of the charges against them. The monitors pulled 60 additional, randomly selected 1502-Bs that have been submitted to the San Quentin DRU since the training concluded in order to determine whether there has been progress on the heels of the training. Unfortunately, 26% of the 1502-Bs still contain inadequate statements of fact. On a positive note, many of the deficiencies relate to the statement of fact associated with an absconding charge while the statement of fact associated with other charges appears much more detailed. The OCC will continue to monitor this issue and work collaboratively with DAPO to track progress and develop additional corrective action should the need arise. The OCC anticipates that improvement will continue but it may take some time for parole agents to incorporate the training material into their business operations.

Charges Added After Notice

CDCR acknowledges that the 1502-B should include all alleged parole violations known to the parole agent at the time the report is authored. According to DAPO informational memo dated January 2, 2008, entitled "Violation Report Format and Content," "The parole agent shall include all known or suspected charges at the time the Charge Report is completed."

Pursuant to the terms of the Valdivia Permanent Injunction and Remedial Plan, the agent of record is given time between submission of the 1502-B and completion of the CDCR 1676 (Violation Report) in order to conduct a follow-up investigation regarding the parole violation(s) alleged against the parolee. During this investigation the agent may discover information leading to additional charges against the parolee which were not presented at the time the notice was completed, and which the parole agent was not aware of at the time the 1502-B was completed. This is often the case where an arrest is initiated by local law enforcement, who often informs the parole agent of the initial reason the parolee was placed into custody. In a number of cases the parole agent does not learn of the panoply of charges alleged against the parolee until local law enforcement concludes its investigation and provides DAPO their complete incident report, after the 1502-B has been completed. CDCR maintains it is not a violation of due process or the Valdivia Permanent Injunction when charges are added after the notice, where the agent did not have knowledge of the additional charges at the time the 1502-B was written. However, a number of cases were reviewed wherein the parole agent had, or should have had, all information related to the added charges at the time the 1502-B was

authored but did not include those charges on the 1502-B for presentation to the parolee at the notice.

There was 27/100 cases in which charges were added after the parolee was served notice. In 14/27 cases (51%) investigation revealed the parole agent had, or should have had, information to support the additional charge(s) at the time the 1502-B was authored. Below are two examples taken from the cases reviewed prior to the tour.

Joseph (F62286); the 1502-B states that on 9/4/08 Joseph was arrested by San Francisco Police department for burglary; however, the agent added charges for use of cocaine and failure to follow instructions on the CDC 1676. The agent reported that on 8/22/08 Joseph reported to the parole office and submitted to an anti narcotics test. The results of this test were returned to the agent as positive for cocaine on 8/28/08. The agent also reports that on 8/25/08 he instructed Joseph to report to the office on 9/3/08, Joseph failed to show. The additional charges predate the arrest and were therefore known at the time the 1502-B was authored.

Opulencia (G09455); the 1502-B states that on 9/3/08 Opulencia was arrested by San Francisco Police department for absconding; however, on the CDC 1676 the agent added a charge for use of methamphetamines. The 1676 states that the parolee reported to the parole office on 8/13/08 and submitted to an anti narcotics test. The results of this test were returned to the agent as positive for methamphetamines on 8/22/08, before the parolee was arrested. The additional charge predated the arrest and was therefore known at the time the 1502-B was authored.

Review of the Revocation Documents

A review of the revocation packets collected prior to the tour revealed the following pertinent compliance deficiencies concerning the notice documents. A breakdown of all compliance deficiencies identified from a review of the notice documents can be found in **Exhibit 1-B**. Copies of the corresponding deficient 1073s are attached as (**Exhibit #6**).

- In 12/33 (36%) in which Section I identified a disability, needed accommodation, or reading/GPL level below 4.0, no source document was attached to the BPT 1073. Where a disability is noted in Section I, the verifying source document should be included in the revocation packet.
- In eight cases in which Section I of the 1073 indicated some accommodation need, or the parolee self-identified a disability or accommodation need in Section II of the BPT 1073, the notice agent did not document in Section III that an accommodation was offered or provided during the notice to facilitate effective communication. Although there has not been specific direction to do this, the information should be documented to protect the notice agents from any claims that an accommodation was not provided during the notice, despite the parolee's documented needs.

❖ **CORRECTIVE ACTION PROPOSED:**

- Paragraph 11 of the *Valdivia* Permanent Injunction requires that the parolee be served with *actual notice of the alleged parole violation, including a short factual summary of the charged conduct*. The OCC recommends that DAPO review any current policies and procedures that address what information must be included on the CDCR 1502-B and make revisions to ensure the due process requirement regarding provision of a short summary of the charged conduct is met, if necessary. It is also recommended that DAPO disseminate a policy and procedure requiring that an adequate short statement of fact for each alleged violation of parole be included on the CDCR 1502-B, and include specific guidance on minimum standards regarding the adequacy of the factual summary.
- Unit Supervisors must ensure that parole agents include all known or knowable charges on the 1502-B when it is written, as required by the recent DAPO training, which addresses this requirement and directs agents to include all known charges at the time the 1502-B is authored.
- DAPO should develop policy and provide training/instruction to notice agents requiring them to document whether an accommodation was offered or provided during the notice based on the information provided in Sections I and II of the 1073. This demonstrates compliance with the ADA requirements in both the *Valdivia* and *Armstrong* litigation and protects the notice agents from later claims that an accommodation was not offered or provided during the notice although a disability or accommodation need was documented on the 1073.
- The OCC will continue to monitor the issue of missing source documents and conduct investigation to determine the causes and report to the appropriate division the findings and recommended corrective action. DAI and DAPO should also review pre-release packet procedures regarding the inclusion of source documents to determine why source documents are not consistently included in parole packets or forwarded to the parole units for inclusion in the field file.
- DAPO and DAI should identify specific locations within each housing unit that allows the notice agent to conduct the Notice of Rights in a manner that will facilitate effective communication during the notice.

IV. Unit Supervisor Review of Violation Report

- 100% compliant with requirement that the Unit Supervisor review the Violation Report no later than seven business days after the parole hold is placed.

Timeliness

A timely Unit Supervisor review of the violation report was conducted in all 100 of the revocation packets reviewed prior to the tour (100%). (**Exhibit 1-A**). The US did not report any issues in meeting the *Valdivia* time frames, as confirmed by the RSTS "Closed Case Summary by Unit - Valdivia Timeliness rules," which reflect an outstanding compliance rating of 100% at the PCD step and a positive rating of 93% at the Refer step. (**Exhibit #2**)

Interviews with Unit Supervisor and Clerical Staff Interviews

The US reported cases are screened for priority designation by agents and he reviews each case for verification. Cases that meet the criteria are stamped "Priority" by agents or the US. In 26/62 (42%) cases reviewed prior to the tour that met the criteria for "Priority" designation the parole agent or Unit Supervisor did not designate "Priority" on the first page of the CDC 1676. (**Exhibits 1-B and #7**). Two of the cases came from the Vallejo parole unit; however, a majority of the deficient cases originated from the San Francisco and Santa Rosa parole units. DAPO issued a memorandum to all staff, dated May 17, 2005 and entitled "Processing of revocation cases related to Penal Code sections 1192.7(C), 667.5, and 290," which provides instruction on this issue and serves as the source for OCC's monitoring on this subject. The OCC has not been informed that the direction provided in the memorandum has been rescinded.

Missing CDCR 1654 form in the attorney copy of revocation packet

78% of the cases reviewed prior to the tour did not include the CDCR 1654 in the attorney copy of the revocation packet (**Exhibit 1-B**). The monitors spoke to the lead clerical staff at the Vallejo parole unit regarding this issue. It was her understanding that because confidential information may be on the form the 1654 was only to be included in the BPH copy of the file. With the assistance of the DAPO HQ representative, a copy of the current DAPO policy and procedures was shown to the staff member, which notes that the 1654 is considered part of the revocation packet and therefore should be included in the attorney's copy. In addition, the parolee's copy of the 1654 is a half-sheet that does not include victim contact information. The clerical lead indicated she would inform the other clerical staff in the unit and immediately implement the change to require that the 1654 is included in the attorney copy.

This issue was not confined to the Vallejo parole unit. The OCC has asked DAPO's *Valdivia* team to issue a statewide reminder that the CDCR 1654 is to be provided in the attorney copy of the revocation packet in every case. The OCC will continue to monitor this issue and recommend additional corrective action if necessary.

The OSM I also identified an issue with respect to the CDCR 1654s, indicating that many are illegible or contain no contact information or identification numbers for peace officers. As a result, DRU staff must expend time and resources to ascertain accurate witness information in order to issue subpoenas. Parole staff should provide legible and complete information on the 1654. DAPO previously issues a Valdivia Alert to staff statewide directing them to submit *legible* and *complete* 1654s. This directive should be followed.

Arrests and convictions noted together on the CDCR 1521-B

15% of 1521-Bs reviewed prior to the tour included prior arrest and convictions together in a way that made it impossible to differentiate the two. Although parole agents were not historically directed that arrests and convictions should not be included together on the 1521-B, and there is no direct policy instructing them to do so, the practice makes it difficult for deputy commissioners and parole administrators to accurately determine “Priority” status, consider whether a parolee is appropriate for a remedial sanction or determine mitigation/aggravation for purposes of case disposition. DAPO concluded statewide training for field staff in December 2008. This subject was included in the training and agents have been directed to differentiate arrest from convictions on the 1521-B. OCC monitors attended the training and the direction is clearly articulated and staff seemed receptive to the information provided. The OCC will monitor this issue in the future to determine whether parole agents follow the direction provided through DAPO’s training.

Inclusion of CDC 1515 when Parolee Charged with Violating a Special Condition of Parole

There were 33 cases reviewed prior to this tour in which the parolee was charged with violating a special condition of parole. The CDC 1515 was included in the revocation packet in all but three cases. The parole agents and unit supervisors should be commended for including this supporting evidence in their revocation packets when the parolee faces an allegation that a special condition of parole has been violated. The CDC 1515 allows defense counsel and the deputy commissioner to verify that the special condition in fact exists and that it was effectively communicated to the parolee.

❖ CORRECTIVE ACTION PROPOSED:

- Unit Supervisors and Parole Agents must familiarize themselves with DAPO/BPH memorandum “Processing of Revocation Cases Related to the Penal Code (PC) Sections 1192.7 (c), and 290” dated May 17, 2005, which outlines the procedures for identifying “Priority” cases on the Violation Report and in RSTS. It may benefit DAPO to reissue the policy to all staff as a reminder that it remains applicable.
- DAPO clerical staff should be reminded that all documents which should be included in the revocation packet, as listed in DAPO’s policy entitled “Implementation of *Valdivia v. Schwarzenegger* Policy and Procedures,” filed with the Court in 2004, are included in the attorney’s copy of the revocation packets (including the CDCR 1654).
- DAPO should ensure that parole agents submit legible and complete CDCR 1654s to the BPH. DAPO previously issued a Valdivia Alert on this issue in 2008.

V. Parole Administrator Review

- **94% compliant with the requirement that a Parole Administrator review the revocation packet no later than nine business days after the parole hold is placed.**

The Par Ads documented their review in 98/100 cases analyzed prior to the tour. A timely Par Ad review occurred in 92 cases (94%). **(Exhibit 1-C)**. The six late cases averaged one day late.

The Par Ad is a retired annuitant who has been working at the DRU for approximately three weeks. She reported she processes 20-50 cases each day and reviews each packet for completeness, "Priority" designation and remedial sanction eligibility and appropriateness for placement. She indicated the parole units are fairly accurate in their "Priority" designation, which enables her to review those cases first. The Par Ad reported she receives an immediate response from the parole units when she requests additional or missing paperwork. She will return a case or dismiss a charge if she feels the behavior does not meet the criteria for the alleged charge. The Par Ad also reported she considers remedial sanctions for every case and that the parole units are doing a good job including remedial sanction recommendations in their documentation. She has become familiar with the programs available in the area through the parole units, her own internet research and she received daily emails from DARS with ICDTP availability. She also considers and makes "out of county" transfers when appropriate. Additionally, she is a resource for deputy commissioners seeking remedial sanctions information during hearings.

VI. Return to Custody Assessment

- **92% compliant with RTCA timeliness requirement**

A timely RTCA was completed in 92/100 cases reviewed prior to the tour (92%). **(Exhibit 1-A)**. The late cases averaged 1.5 days late. *Id.* According to RSTS, 98% of RTCAs were timely in the month of November 2008. **(Exhibit #8)**.

The CalPAP attorneys all reported they received the RTCA before meeting with their clients. All reported that it is very rare that an RTCA is not available by the time they conduct the attorney/client interview.

The RTCA documents for the cases reviewed prior to the tour did not yield any compliance deficiencies. The DCs should be applauded for their complete and thorough work on this aspect of the revocation process.

VII. Appointment of Counsel

Timely Appointment of Counsel

BPH staff entered information into RSTS regarding the timely appointment of counsel in 98/100 cases reviewed prior to the tour. Counsel was appointed timely in 94/98 reviewable cases (96%). Plaintiffs' counsel, in their September 25, 2008 report for San Quentin, state that the RSTS Case Status Reports do not track when the information was actually received by CalPAP, but only the date it was sent, and that as a result actual compliance numbers may be lower. However, data regularly collected and provided by CalPAP reflects timeliness that is calculated from the date the packets are actually received by CalPAP. Plaintiffs have this information available when they draft their reports and, as such, there is data available to determine timeliness from CalPap's perspective.

Data from the Larkspur CalPAP office indicates the following case assignment timeliness statistics for San Quentin from June to October 2008 (**Exhibit #9**).

Month	Number of Cases Reviewed	Number of Timely Cases	Percent on-Time
June 2008	640	621	97.03%
July 2008	684	671	98.10%
August 2008	600	579	96.50%
September 2008	649	623	95.99%
October 2008	721	692	95.98%

Regardless of the source of the data (RSTS or CalPap's tracking), San Quentin's compliance in this area is impressive. There is no evidence to indicate that plaintiffs' conjecture regarding timeliness has any merit. CalPap's data shows that cases are consistently assigned in a timely manner.

Review of the Revocation Documents

A review of the revocation packets analyzed prior to the tour revealed the following compliance deficiency:

- In 45/100 (45%), Cal PAP did not complete the "Notice Acknowledgement" segment of the BPT 1104-B. The line requiring verification of forms received during the notice was not completed. The purpose of this line is to act as a check and balance on the CDCR's provision of documents to the parolee during parole revocation proceedings. If the parolee received all documents during the notice, the attorney should have written "N/A" on the corresponding line. If any document was not provided during the notice, the attorney should indicate such.

VIII. Effective Communication and Effective Communication with Appointed Counsel

CDCR must provide effective communication and accommodations to parolees with disabilities at all parole proceedings, pursuant to litigation in *Armstrong v.*

Schwarzenegger. The *Valdivia* Permanent Injunction requires effective communication and provision of reasonable accommodation(s) throughout the revocation process.

Missing BPT 1073s and/or Source Documents

The BPT 1073 was missing from two revocation packets reviewed prior to the tour. Of the 33 packets reviewed wherein Section I of the 1073 identified a disability, needed accommodation, or reading/GPL level below 4.0, there were 12 cases (36%) in which no source document was attached to the BPT 1073. Where a disability is noted in Section I, the verifying source document should be included in the revocation packet. **(Exhibit 1-B)**

According to Cal Pap's October 2008 "Cases Missing 1073 & Source Documents Monthly Report," 99% of cases processed for the month contained the BPT 1073. **(Exhibit #10).** Of those that required source documents, 83% had the source document attached.

Disabilities and Effective Communication System (DEC)

DAPO- The DRUNA uses DEC as required by current policy and procedures. He did not report any issues or concerns.

BPH- All three DCs observed during the tour utilized DEC when conducting their interactive ADA review and all updated the information in DEC at the conclusion of the hearing. None of the DCs reported any issues regarding the use of DEC.

Sign Language Interpreters

DAPO- A sign language interpreter was not required during the monitoring tour. The notice agent reported he has contact information to request an interpreter should the need arise. Additionally, San Quentin has a sign language interpreter on-site.

Foreign Language/CyraCom

DAPO- None of the notices observed during the tour required the use of the CyraCom system. The notice agent did not report any issues concerning the use of CyraCom within San Quentin.

BPH- The Language People translation services were utilized during the probable cause hearing for parolee Salvador (F18764), who is Spanish speaking. Although there were a few instances in which the translator did not translate once an individual had finished speaking, the DC reminded the translator that she needed to translate everything that was said during the hearing, not only the statements made by the DC. The DC did an excellent job keeping the hearing in line, speaking slowly, and ensuring the translator understood the unique revocation terms before translating. The translator asked for clarification or for statements to be repeated before translating to the parolee in order to ensure accurate translation.

ADA Accommodations Available

DAPO- The notice agent has been assigned the required ADA equipment and carried the equipment with him during the notices.

BPH- Several parolees whose hearings were observed during the tour required some form of accommodation. For example, parolee Salvador (F18764) requires reading glasses. The DC made a page magnifier available for use during the hearing. Although parolee Reeder (T06559) also requires glasses he brought his own to the hearing. The DC nonetheless made the magnifier available should the parolee wish to use it. Parolee Haid (T80922) reported he was in a car accident and now has some trouble concentrating, understanding and remembering things. The DC explained, using simple English that the parolee could ask questions or seek clarification at any time if there was something he did not understand. All parolees were offered/provided accommodations based on their ADA needs, as reflected on the BPT 1073 and in DEC, and through the interactive ADA review conducted at the inception of the hearing.

Section IV of BPT 1073

In 28/100 (28%) cases reviewed, Section IV of the BPT 1073 was not completed in DEC by DRU staff (**Exhibit #11**).

❖ CORRECTIVE ACTION PROPOSED:

- The OCC will continue to monitor the issue of missing source documents and conduct an investigation to determine the causes and report to the appropriate divisions the findings and recommended corrective action. DAI and DAPO should also review pre-release packet procedures regarding the inclusion of source documents to determine why source documents are not consistently included in the parole revocation packets.
- BPH supervisors must ensure that DRU staff complete Section IV of the BPH 1073 in DEC in order to identify accommodations that must be provided during the PCH or revocation hearing.

IX. Confidential Information and Access to Parolee Field File

Staff at the Vallejo Parole Unit is familiar with the department's policy and procedures that defense attorneys can request to review the parolee field file and will follow department protocol as directed.

X. Probable Cause Hearing

- **97% compliant with the requirement that a PCH occur no later than 13 business days after the parole hold is placed.**

Timeliness

A timely PCH occurred in 97/100 (97%) cases reviewed prior to the tour. The late cases averaged one day late. (**Exhibit 1-A**). The monitors also observed eight PCHs during the tour, all of which were timely. Therefore, 105/108 total cases were timely (97%). Data from the Larkspur Cal PAP office indicates the following PCH timeliness statistics for San Quentin from June to October 2008 (**Exhibit #12**).

Month	Number of Cases Reviewed	Number of Timely Cases	Percent on Time
June 2008	566	557	98.41%
July 2008	659	649	98.48%
August 2008	559	543	97.14%
September 2008	602	593	98.50%
October 2008	633	616	97.31%

The data shows that San Quentin consistently holds timely hearings in large numbers. The CDCR believes these high percentages are evidence of compliance in the litigation and BPH staff should be applauded for their work in this regard.

Quality

The monitors observed two DCs conduct the hearings. One of the DCs was observed during plaintiffs August 2008 tour of San Quentin. Plaintiffs' counsel reported that this DC did not conduct interactive ADA reviews with parolees, explain the purpose of the PCH, ensure that the parolees understood their rights, or articulate his findings of probable cause. Corrective action has been taken with respect to three of the deficiencies. Specifically, the DC was observed to conduct thorough, interactive ADA reviews, which included a review of DEC. The DC did not review the BPH 1100 verbatim, but did ensure that the parolees understood their rights and verified with counsel that all rights had been met up until that point. Finally, the DC articulated his findings of probable cause during each hearing, both announcing his probable cause findings and the evidence he relied on in making his decision. The DC, however, failed to explain the purpose of the PCH during any of the hearings. It was obvious that the DC had been provided corrective action since the last time he was observed through monitoring and had changed his practices to conform to the requirements of the Injunction and applicable departmental policies and procedures.

The other DC also conducted a thorough and interactive ADA review, including a review of DEC. However, he did not explain the purpose of the hearing, specifically review the charges (although he asked counsel if they had reviewed all charges with the parolee), or verbally articulate his probable cause findings or the evidence that supported his findings. In addition, during the hearing for parolee Hickman (F63345), who was charged with assault, damaging a wireless communication device, vandalism, and criminal threats, the DC did not allow any discussion regarding probable cause. Before the hearing the attorney informed the DC that the parolee denied the charges and would most likely want to proceed to a full revocation hearing. At one point during the hearing the DC stated, "We are not going to discuss the charges here today" when the parolee tried to argue his innocence. This is troubling because the parolee has a right to present evidence to dispute probable cause during the PCH but was not given the opportunity to do so during his hearing.

With the exception of the Hickman hearing, the DCs allowed the parolee and defense counsel to present evidence in defense and mitigation to the charges. Counsel for parolee

Salvador (F18764), whose charges included failing to attend the Parole Outpatient Clinic (POC), argued that his files did not contain any records showing the parolee had a POC appointment and that there was insufficient notice to the parolee and defense counsel of any evidence to support the charge. The DC agreed and the charge was dismissed.

Both DCs completed Section V of the BPT 1073 in DEC at the conclusion of each hearing.

Evidentiary Basis for Probable Cause Finding Documented by Deputy Commissioner

The DC must document the actual evidence relied on when finding probable cause, rather than simply citing the source of the evidence or the ultimate conclusion that probable cause was found. For example, if the parolee is charged with absconding it is insufficient to note “probable cause found based on AOR report.” A better statement of the evidence relied on might state, “probable cause because parolee was left instructions to call AOR, but did not follow instructions and was unavailable for parole supervision from 03/15/08 until the date of arrest.” The DCs did not adequately document the evidentiary basis for their probable cause finding in 51/100 (51%) of the cases reviewed prior to the tour. **(Exhibits 1-B and #13).** In addition, the DCs did not adequately document the evidentiary basis for their probable cause findings in 5/8 hearings observed. One DC documented an appropriate and sufficient evidentiary basis for all charges except absconding, for which he wrote language such as “AOR claims he was unavailable for supervision from 11/15/08 until his arrest.” The other DC did not document the evidentiary basis for his probable cause findings for any charges. For all four hearings he conducted, the DC wrote “Probable cause on charges, based upon information provided.” No other information was provided in the RSTS documents to support his probable cause findings.

Review of the revocation documents

The revocation packets analyzed prior to the tour revealed the following compliance deficiencies:

- There were only two cases in which the DC did not complete Section V of the BPT 1073 in DEC. **(Exhibits 1-B and #11).**

Parolee Transfers

The OSM I at the DRU indicated that there are instances where a parolee is transferred to San Quentin prior to the PCH and is placed on the PCH calendar at San Quentin. Thereafter, the parolee is transferred to a mental health crisis bed, the California Medical Facility, or other location for psychiatric or medical treatment, but nobody informs BPH of the transfer. The BPH could schedule other PCHs in the timeslot allocated for transferred parolees and exercise a better use of hearing time if they were informed in advance that a parolee has been moved. In addition, BPH is not informed when the parolee returns to San Quentin so they can put him/her back on a hearing calendar.

❖ CORRECTIVE ACTION PROPOSED:

- **DCs must be instructed to explain the purpose of the probable cause hearing to the parolee. According to the “Deputy**

Commissioner Manual for Parole Revocation Proceedings,” the DC must explain the proceedings to the parolee. The explanation will include, but is not limited to, statements indicating that the hearing is being held to: 1) Determine whether or not probable cause exists to believe the parolee committed a criminal act or violated the conditions of parole; 2) Determine if the acts committed warrant continued incarceration even if probable cause is found; and 3) Discuss potential dispositions in an attempt to conclude the revocation proceedings while ensuring public safety and protecting the due process rights of parolees. (p.36 of manual).

- DCs must be instructed to announce their findings regarding probable cause. According to the “Deputy Commissioner Manual for Parole Revocation Proceedings,” based on a review and analysis of all documents and testimony the DC will make a determination and announce the finding. This announcement must include both a probable cause finding in regard to each charge. (p. 37 of manual).
- Associate Chief Deputy Commissioners must ensure the DCs are documenting the actual evidence relied upon in making a finding of probable cause. Merely citing the source of the evidence alone does not comply with the requirements of minimum due process. BPH would also benefit from including this subject in the next training for deputy commissioners.
- DCs must be instructed that they are required to allow parolees and defense counsel the opportunity to present evidence and dispute the existence of probable cause at the PCH.

XI. Revocation Hearing

For all parolees who do not waive or seek a continuance of a final revocation hearing, Defendants shall provide a final revocation hearing on or before the 35th calendar day after the placement of the parole hold. (Paragraphs 11(b) (iv) and 23) Valdivia Permanent Injunction.

Timeliness

Ten cases reviewed prior to the tour proceeded to a revocation hearing and nine were timely (90%). (**Exhibit 1-A**). The late hearing was for parolee Arroyo (F95252). However, a review of RSTS reveals that the parolee was NIC’d at his PCH and a revocation hearing was subsequently scheduled. However, a note in the RSTS Case Status Report indicates that the initial revocation hearing was cancelled and rescheduled, although the notes do not provide dates. The revocation hearing was held on the 51st calendar day following the hold but there was no liberty interest as the parolee was released to the community following the PCH.

The monitors also observed three revocation hearings during the tour, two of which were timely. Therefore, 11/13 total revocation hearings were timely (85%).

According to RSTS, all 53 of the revocation hearings heard at San Quentin in November 2008 were timely. According to CalPAP's monthly statistics, 95.31% of revocation hearings were timely in September 2008 and 97.40% were timely in October 2008 (**Exhibit #14**).

Quality of Hearings

The monitors observed one DC conduct all three revocation hearings. All procedural aspects of the hearing occurred in a manner consistent with current BPH policy and procedures and directives. The DC conducted a thorough ADA review, utilized and updated DEC, and reviewed the charges and revocation rights (the DC only specifically reviewed the right to an impartial hearing officer but ensured with defense counsel that all procedural rights had been met and allowed defense counsel to enter preliminary objections). A summary of each hearing and the substantive issues presented during each is discussed below.

1) Dowell (G02487)- The parolee was charged with possession of a firearm and possession of cocaine for sale. The parolee was initially scheduled for a revocation hearing on 12/01/08. Defense counsel made a preliminary objection at that hearing, arguing violation of the 35-day timeframe and that she had not received the complete police reports prior to the hearing. The DC denied the objection, stating "Subject activated optional waiver which was for 12I. The revocation hearing was scheduled a few days past the 35th day from activation but no violation of *Valdivia* as subject had taken an optional waiver, accepted 12I. This case will be heard approximately on 50th day after activation of waiver. Postponed so counsel has appropriate police reports. Also subject is held on public safety hold grounds. Due to seriousness of charges and criminal history all involving possession of firearms." The rescheduled hearing was observed on 12/17/08, where defense counsel renewed her objection that the charges should be dismissed for violating timeframes. The DC denied the objection and documented his ruling on the BPH 1103-REV as follows: "The decision of the DC from the 12/01/08 hearing is reaffirmed based on the seriousness of the charges and behavior alleged being a threat to public safety and the less weight given to timeframe delays after parolee has activated an optional waiver." Based on CDCR's 2006 policy decision to hold cases over past the 35-day timeframe where a significant public safety concern is present, this case seems an appropriate use of the policy. The parolee fled from officers while in possession of a firearm and at one point a police officer deemed it appropriate to discharge his weapon at the parolee. In addition, the parolee has criminal history that involves weapon charges.

Defense counsel then made an objection to any statements made by non-appearing police officers, based on *Comito*. This objection and the DC's ruling are discussed in Section XV below.

After all testimony was heard and the objections ruled on, the DC dismissed the drug charge and found good cause on possession of a firearm. The DC allowed defense counsel and the parole agent to present evidence during the dispositional portion of the hearing. After hearing all evidence the DC assessed the parolee a 12I return to custody.

2) Manuel (D14170)- The parolee was charged with absconding, fraud, petty theft and association with prohibited persons. After the parole agent laid the evidentiary foundation for the charges the parolee blurted out that he is not contesting the charges. Defense counsel requested a recess to speak with this client, which was granted. After the recess the parolee again stated he wanted to admit to the charges and wanted ICDTP. The DC announced his good cause findings based on the parolee's admissions and the case proceeded to the dispositional phase.

The parolee's sister, who is the basis of the no-contact order, was present to testify. She was subpoenaed as an evidentiary and dispositional witness. She confirmed that the parolee had taken a check from her and cashed it, and that he had been staying at her house in violation of the no-contact order. She further testified that the restraining order resulted from the parolee's behavior while on drugs but that she was no longer fearful of him, wants contact with him, and needs his help due to her health problems. She recognized the parolee's continued drug addiction and asked that he receive treatment.

After testimony concluded, defense counsel felt it prudent to make legal argument concerning one of the charges (association with prohibited person). The charge was based on the parolee's contact with his sister, who had a prior restraining order against him which resulted in the no-contact special condition imposed by DAPO. The restraining order expired in December 2006 and the parolee's sister testified that she was not afraid of the parolee and that she would like to have contact with him. Furthermore, the parole agent testified that the sister had requested the no-contact order be lifted but she and the parolee never came to the parole office to have the order lifted. Defense counsel made a *Lent* objection, arguing that the condition is not reasonably related to future criminality. The DC noted that the parolee admitted the charge and should address having the condition removed through his parole agent. The DC opined that the condition satisfies *Lent* and that the sister testified he presently stole from her, which shows the condition is related to present and future criminality. The DC documented the basis for his ruling on the objection on the BPH 1103-REV as follows: "Counsel objected to the special condition to have no contact with [his sister]. This is denied because the condition was based on a restraining order [his sister] filed to protect herself from his dangerous behavior while on drugs. This was confirmed by him stealing from her and his ongoing drug use."

The parole agent was not opposed to allowing the parolee to participate in the jail-based ICDTP. However, the DC noted the parolee had been referred to the STAR program twice and the ICDTP program once (the parolee completed both STAR programs but did not complete the community-ICDTP). In addition, the DC stated the parolee is not eligible for the jail ICDTP programs based on his robbery convictions. The DC was not comfortable sending the parolee back to a community ICDTP because the parolee walked away from the last community ICDTP he participated in. The parole agent then recommended that the parolee serve some time in custody given his drug and absconding history, followed by a residential program. After all dispositional testimony was heard, including recommendations regarding disposition, the parolee was assessed a 5I return to

custody with a special condition of parole to enroll in and complete a residential drug rehabilitation program of at least six months at the direction of DAPO, followed by outpatient counseling.

3) Handy (F22192)- The parolee was charged with burglary of an automobile and receiving stolen property. One of the arresting officers was present to testify, but the confidential informant who observed the burglary and identified the parolee as the burglar and the vehicle owner were not present to testify. As a result, a large portion of the hearing focused on *Comito* objections. A discussion of the objections, as well as the DCs ruling and analysis, are discussed below in Section XV. After all evidence was heard and the objections ruled on, the DC found good cause on receiving stolen property and dismissed the burglary charge. The parolee was assessed a 7I return to custody with a special condition of parole to enroll in and complete a residential drug rehabilitation program of at least six months at the direction of DAPO, followed by outpatient counseling.

XII. Remedial Sanctions

According to RSTS, 171 parolees processed at the San Quentin DRU were given a remedial sanction by the BPH at the RTCA, PCH, OWR or revocation hearings steps in the month of December 2008. Placements in the ICDTP and Proposition 36 constituted the largest number of remedial sanction placements. Ten parolees were placed in other programs. **(Exhibit #15).**

The Deputy Commissioners were provided daily updates on the availability of ICDTP beds. During the observed hearings it did not appear that Deputy Commissioners considered any remedial sanctions other than the ICDTP or Proposition 36. It also appeared that Deputy Commissioners were unaware that there are community ICDTP programs that are able to accommodate parolees with disabilities or mental illness.

Staff reported that transportation delays to the community ICDTP programs persist. Some parolees reported they have been waiting weeks to be transported to the ICDTP. Defendants are working to identify the global and site-specific problems which contribute to untimely transfer from the institution to the ICDTP.

XIII. Mentally Ill Parolees

As noted in plaintiffs' most recent tour report for San Quentin, the ACDC has taken an active role in facilitating the current GAP interim process for handling cases in which the parolee is unable to participate in the revocation process due to mental illness. Plaintiffs noted some logistical concerns when the interim process initially rolled out, but those appear to have been resolved now that the process has been in place for some time. All staff interviewed during the tour was aware of the procedures associated with the interim process. Cal PAP attorneys are regularly contacting BPH staff to provide status updates and hearings are being rescheduled every two weeks. Cal Pap's Gap Parolee Logs indicate that status checks are occurring with frequency and that information regarding a parolee's status is being communicated to the necessary parties.

According to Cal Pap's December 19, 2008 GAP Parolee Log, the Larkspur Cal PAP office currently has six cases in suspended status. One of those parolees remains unable to participate in the revocation process as of this date. The other five have been deemed able to participate in the revocation process: two accepted return to custody offers at their rescheduled hearings and three others are awaiting a revocation hearing (**Exhibit #18**).

XIV. Ability to Subpoena Witnesses

Two parolees rejected the final PCH offer and opted to proceed to a full revocation hearing. In both instances the DC allowed the parolee to select witnesses to be subpoenaed for the hearing. The DC did not deny the parolee any witnesses. There were no compliance issues identified in this process.

XV. Presentation of Evidence at Revocation Hearings

Due process requires that a parolee be allowed to confront and cross-examine adverse testimonial witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation. The *Valdivia* Permanent Injunction further requires that the use of hearsay evidence shall be limited as set forth the U.S. Supreme Court case *United States v. Comito*, which involves a balancing of the parolee's interest in confrontation and weighing that against the government's good cause for not producing the adverse witness.

Comito objections were lodged during two revocation hearings observed during the tour. A summary of the objections and the DCs application of the *Comito* balancing test are discussed in turn below.

1) Dowell (G02487) - The parolee was charged with possession of a firearm (with a prior firearm conviction) and possession of cocaine for sale. According to the parole and police reports, the parolee ran from police officers as they approached him on the street. One of the officers observed a gun on the parolee's person and initiated a pursuit, during which the officer discharged his service weapon. As a result, the officer was immediately removed from the pursuit. A short time later the parolee was apprehended by other officers, who recovered a gun on a nearby roof. Another police officer, who transported the parolee to the jail, was tasked with conducting a search of the parolee and his clothing. The officer located five individually wrapped packages of cocaine in the parolee's pants pocket.

Several police officers were involved in the pursuit and eventual arrest. Three officers were subpoenaed for the revocation hearing and two were present to testify. The first officer was the one who initially attempted to contact the parolee, initiated the foot pursuit, observed a gun on the parolee's person, and discharged his weapon at the parolee during the pursuit. The officer testified that he clearly observed a gun in the parolee's waistband when the parolee ran away and attempted to jump a fence. In addition, the officer could clearly read the word "Glock" on the butt of the object protruding from the parolee's waistband. However, the officer could not testify directly to anything that occurred after he discharged his weapon and removed himself from the pursuit. The

second officer did not see the parolee in possession of a gun, did not see him throw a gun onto a rooftop, or observe the search of the parolee that revealed the cocaine. He had no personal knowledge of the charges and had only interviewed the parolee. The only substantive information this witness could present was the statement made by the parolee that he never had a gun in his possession. The officer who conducted the physical search of the parolee and located the cocaine was not present at the hearing, despite having been issued a subpoena.

After the witness testimony concluded, defense counsel lodged a *Comito* objection to any statements associated with locating the gun on the rooftop and locating the cocaine during the search of the parolee because all evidence with respect to those points was hearsay. Furthermore, counsel objected to reliance on police reports written by any other officer who did not appear because those witnesses were unavailable for cross-examination. The DC granted the *Comito* objections, refusing to rely on any of the hearsay statements included in the various police reports as a basis for his decision. The DC applied the *Comito* test and reasoned that the officer who located the cocaine was subpoenaed, no other attempts were made to secure his presence, and the defense has important and relevant questions to pose on cross-examination. The DC ruled that the right to confrontation was not outweighed in this instance. Because there was no direct evidence to support cocaine possession, the charge was dismissed. However, based on the eyewitness testimony that a gun was observed on the parolee's person, good cause was found on the gun possession charge. The parolee was assessed a 12I return to custody.

The DC documented the *Comito* objection and his analysis on the BPH 1103-REV.

2) Handy (F22192) -The parolee was charged with burglary of an automobile and receiving stolen property. The charges stemmed from an incident in which an anonymous informant reported to police that a black male had smashed the window of a car at a BART station and stolen items from the car (the informant had witnessed the incident from the window of his nearby apartment using binoculars). After being provided a description of the suspect, police arrived at the vehicle and observed the damage, then searched the area and located the parolee, who matched the description. The parolee had a car stereo on his person and reported he bought it from a "crack head" for \$10 at around 10:00 p.m. The parolee agreed to return to the scene for a line-up and the confidential informant positively identified the parolee from his apartment window using a set of binoculars (the informant did not appear in person due to his fear of retaliation).

The responding police officer was present at the revocation hearing and testified to his direct observations and knowledge of the incident, and also offered hearsay statements into evidence regarding the confidential informant's statements and identification of the parolee as the burglar. However, the police officer did not personally observe the crime and could not provide first-hand testimony regarding the parolee's involvement in the incident, other than the fact that he had a car stereo on him at the time he was contacted. The confidential informant was never subpoenaed for the hearing. Defense counsel

objected that all evidence regarding the breaking and entering of the vehicle and the informant's subsequent identification of the parolee as the person who burglarized the vehicle is hearsay and must be excluded under *Comito*. The DC granted the *Comito* objection, noting that the informant was never subpoenaed. However, the DC did not actually apply the *Comito* test on the tape recorded record. The DC documented the basis for his ruling on the BPH 1103-REV as follows: "The informant was not subpoenaed. His unavailability due to fear is arguable as he did not want his name divulged. However, he could have testified outside the presence of Handy and without his name being divulged. His statements were highly important to the charge. Questions regarding his identification of subject were also important and could not be asked. The right to cross-exam his statements were not outweighed by other factors." The DC then dismissed the burglary charge.

The owner of the vehicle was also subpoenaed but did not appear. The police officer offered the owner's hearsay statements into evidence. Defense counsel again made a *Comito* objection to any previous statements made by the vehicle owner because it was imperative that he be present to be cross-examined about the value of the car stereo in order to determine whether the elements of receiving stolen property were met (i.e. whether the parolee should have known that the stereo was stolen if he purchased it for \$10 from a crack head). The DC denied the *Comito* objection, stating the following as the basis for his ruling: "Obviously his testimony is important, goes to the charge of receiving stolen property. However, he was subpoenaed, he is not here, and there are probably various reasons why he is not here. He may be fearful as well. He got his stereo back. He may not care anything more about it after that. I am finding that he is unavailable." The DC then stated "There was other reliable evidence presented to support the parolee's knowledge that the stereo was stolen, namely that he bought it from a crack head at a BART station for \$10 at night." Lastly, the DC reasoned that "There was very little reason to doubt the witness's statements and they were corroborated by the totality of the circumstances." The DC documented the objection and his ruling on the BPH 1103-REV as follows: "[Witness's] statements were highly important to charge. He was subpoenaed, and it is now known that the agent could have done anything more to produce him. Little reason was given to doubt his statements given that the testifying officer saw broken windows and recovered the merchandise of the owner, which the vehicle owner identified as his. When asked what was to be gained by cross-examination of the owner, the attorney said he would want to know the value of the items and their condition. This was of little importance, given that under the circumstances, Handy must have considered that items carried by a drug addict at a BART station at around 10:00 p.m. were most likely stolen."

Even if the DC's *Comito* analysis was incomplete, it was harmless error because there was other evidence presented to support a good cause finding on the charge of receiving stolen property. The police officer testified that the parolee stated he bought the stereo from a crack head for \$10 at 10:00 p.m. The DC reasoned that it is common sense to reasonably believe that a stereo sold by a crack head, at a BART station, at night, is stolen. The officer also testified that the cloth bag in which the stereo was recovered was part of the burglarized vehicle (like a seat or headrest cover). This evidence led the DC

to find good cause on the charge of receiving stolen property. The parolee was assessed a 7I return to custody.

XVI. Staffing Levels

Defendants shall maintain sufficient staffing levels in the CDC and BPT to meet all of the obligations of this Order. (Page 6, lines 15-17) Valdivia Permanent Injunction.

Staffing levels are, for the most part, sufficient to meet the obligations of the order. The current *Valdivia* staffing levels are summarized in the chart below.

BPH:

There are currently four Office Technician (OT) and one Program Technician III vacancies at the DRU. The Office Services Manager I was conducting interviews for the OT positions during the tour. The OSM I selected three viable candidates for the vacant OT positions and is awaiting approval of their hiring packages. All DRU staff is cross-trained so they are able to provide workload coverage when there are vacancies or sick/vacation leaves. A review of RSTS indicates that the existing DRU staff has been able to complete the necessary work in a timely and complete manner despite the vacancies.

DAPO:

The DAPO Supervising Notice Agent stated she has a full staff of Notice Agents as she has recently filled DRUNA vacancy for San Quentin State Prison.

The Vallejo Parole Unit Supervisor reported he has a full compliment of agents and support staff. There were no reported problems related to staff issues that would impact the workload effecting Valdivia time frames.

XVII. Revocation Extension

Staff from the Office of Court Compliance interviewed the C&PR, assistant C&PR, two Office Technicians and a Correctional Counselor I at SQ regarding the revocation extension process. All staff interviewed understood the Valdivia process but expressed a need for additional training.

At SQ, the C&PR receives the CDC 804 and a copy of the CDC115 from records staff, initiates the case in RSTS, checks DEC, enters information in Section I of the BPH 1073 and then forwards the packet to the assigned CCI who completes the NOR serve.

The office of court compliance reviewed closed revocation extension cases at SQ between November 1, 2008 and November 30, 2008. The following is a summary of the eight cases that were processed:

Timeliness of receipt of CDC 804 and CDC 115

There were eight cases processed at this step, five of which were processed late. The late cases averaged two days late and one case was ten days late.

Timeliness of Notice of Rights

There were eight cases processed at this step; six of the cases were processed timely, one case was three days late, the other was 26 days late. RSTS allows the Correctional Counselor I (CCI) to enter into RSTS relevant NOR information, including the date on which the notice was successful. However, none of the CCIs at San Quentin entered this information into RSTS. Therefore, there is no way to determine when the notice actually occurred. The revocation packet tracking feature in RSTS indicates the date on which the packets are provided to the CCI and the date on which is returned to Case Records, but that does not provide enough information to determine whether a notice was actually timely. The CCI indicated that they have never been told to make any entries into RSTS nor have they been trained how to enter pertinent notice information into RSTS.

Timeliness of Revocation Extension packets referred to the BPH

RSTS indicates that six cases were processed at this step and that four were processed late. However, after reviewing all eight cases manually it was determined that all eight cases were in fact processed at this step and six of them were late. Two cases were processed one day late, two cases processed six days late, one case processed eighteen days late and one case was processed twenty one days late. There appears to be an ongoing tracking problem within RSTS and the OCC is continuing to work to identify the gaps in data collection and make recommendations to resolve this problem.

Timeliness of attorney appointment

There were seven cases processed at this step. RSTS indicates that four cases were late; however, there are no dates entered into RSTS to determine the date on which an attorney was appointed. It is possible that all were timely. The OCC will work with the RSTS team to look into the gaps in data collection for some kind of resolution (in order to determine whether CDCR staff is not entering the necessary tracking information into RSTS or whether RSTS itself requires modification in order to accurately report timeliness).

Timeliness of attorney consultation

There were seven cases processed at this step. RSTS indicates that all eight cases were late; however, there are no dates entered into RSTS to confirm when the attorney consultation occurred so it is unclear how RSTS calculated these cases were late. It is possible that all were timely at this step. The OCC will work with the RSTS team to look into the gaps in data collection for some kind of resolution (in order to determine whether CDCR staff is not entering the necessary tracking information into RSTS or whether RSTS itself requires modification in order to accurately report timeliness).

Timeliness of Probable Cause Hearing

Two cases were dismissed at the revocation extension assessment step (one case was dismissed for violation of timeframes and the revocation release date was reaffirmed in the other). Of the five cases that continued to the PCH step only one was processed late and it was already past the PCH time constraint at the time of the notice occurred (Belveal, K63424). The discovery date was 10/4/08 but RSTS indicates that CDC 804 was not received at Case Records until 10/22/08, 12 business days after the discovery

date. Nonetheless, the PCH occurred on 11/03/08, 20 business days after the discovery date. The parolee rejected the offer and proceeded to a revocation hearings (which was held timely on the 35th day) and was assessed 20E. (**Exhibit #16**). The remaining PCHs were timely.

Timeliness of Revocation Extension Hearing

There were three cases processed at this step, two of which were processed late. Both late cases were for the same offender (Soriano, F-51820). It appears a supplemental charge was added the day after the initial charge was reported. Both charges were heard together at a timely PCH. However, it appears both cases were heard separately at the revocation hearing step. The BPH attempted to hear one of the charges on 10/16/08 but the hearing was postponed because the parolee was psychiatrically unavailable. Ultimately, this charge was dismissed. The parolee was eventually deemed able to resume the revocation process and the remaining charge was ultimately heard on 11/12/08 and the parolee was assessed 90E (**Exhibit #17**).

❖ CORRECTIVE ACTION PROPOSED:

- **DAI should provide additional training to its staff on both the *Valdivia* policies and procedures related to revocation extension and the use of RSTS.**

XVIII. Processing Revocation Paperwork for Short Returns to Custody

The OSM I reported that Case Records has been unable to process paperwork for cases where the parolee received credit for time served or received a short return to custody (generally four months or less) in a timely manner. As a result, paperwork necessary to calculate the release date is not processed by the time the ultimate release date arrives and parolees are detained beyond their release date. DRU staff hand-delivers all paperwork for such cases to Case Records on a daily basis to ensure they are received as quickly as possible and made that these cases must be processed expeditiously.